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WAYNE BERRY
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

| | | |
|---------------------------|---|-----------------------------|
| WAYNE BERRY, |) | Civ. No. CV03 00385 SOM-LEK |
| |) | (Copyright) |
| Plaintiff, |) | |
| |) | |
| vs. |) | DECLARATION OF TIMOTHY J. |
| |) | HOGAN IN SUPPORT OF |
| |) | PLAINTIFF WAYNE BERRY'S |
| |) | OPPOSITION TO DEFENDANT C&S |
| HAWAIIAN EXPRESS SERVICE, |) | WHOLESALE GROCERS, INC.'S |
| INC., et al. |) | STATEMENT OF APPEAL RE: |
| |) | ORDER DENYING EX PARTE |
| |) | MOTION FOR WRIT OF |
| |) | EXECUTION AFTER JUDGMENT; |
| |) | EXHIBITS "1" TO "14" |
| Defendants. |) | |
| |) | |

I, Timothy J. Hogan, an am attorney licensed to practice before all the courts of the state of Hawaii and am admitted to practice before this court, and hereby declare under penalty of perjury that the following is true and accurate to the best of my knowledge and belief. If called upon to testify regarding the matters contained herein, I am competent and willing to do so.

1. Attached hereto as Exhibit "1" is a true and correct copy of Plaintiff's Trial Exhibit "53" admitted into evidence on February 25, 2003, in Wayne Berry v. Fleming Companies, Inc., 01-CV-00446 SPK LEK (D. Hawaii) as set forth in the Hawaii District Court's Docket entry Number 189.

2. Attached hereto as Exhibit "2" is a true and correct copy of Plaintiff's Trial Exhibit "52" admitted into evidence on February 25, 2003, in Wayne Berry v. Fleming Companies, Inc., 01-CV-00446 SPK LEK (D. Hawaii) as set forth in the Hawaii District Court's Docket entry Number 189.

3. Attached hereto as Exhibit "3" is a true and correct copy of the Special Jury Verdict filed in Wayne Berry v. Fleming Companies, Inc., 01-CV-00446 SPK LEK (D.Hawaii), on March 6, 2003.

4. Attached hereto as Exhibit "4" is a true and correct copy of an order filed in Fleming Companies, Inc. v. Wayne Berry, Adv. No. 03-54809(MFW), In re Fleming Companies, Inc., Bk. No. 03-10945(MFW) (Bankr. Del.) in which the

Delaware Bankruptcy Court denied the request for an injunction dated August 8, 2003.

5. Attached hereto as Exhibit "5" is a true and correct copy of an Exhibit that served upon me at the Fleming Companies, Inc. Bankruptcy Plan Confirmation Hearing in the United States Bankruptcy Court for the District of Delaware, on July 24, 2004. This document was admitted as part of the record of the Fleming Confirmation Hearing.

6. Attached hereto as Exhibit "6" is a true and correct copy of the December 27, 2004, Order Denying Fleming's Renewed Motion for Judgment as a Matter of Law Pursuant to 17 U.S.C. 117, filed on March 20, 2003; Fleming's Renewed Motion for Judgment as a Matter of Law that the 'End User License Agreement' is Unenforceable Against Fleming, filed on March 20, 2003; Berry's Motion for Entry of Permanent Injunction, filed March 20, 2003 all renewed on September 17, 2004 filed in Wayne Berry v. Fleming Companies, Inc., 01-CV-00446 SPK LEK (D. Hawaii) on December 27, 2004.

7. Attached hereto as Exhibit "7" is a true and correct copy of the Declaration of Mark Dillon, filed in the Delaware Bankruptcy Court on or about July 25, 2003.

8. Attached hereto as Exhibit "8" is a true and correct copy of Fleming

PCT's Reply Brief filed in the appeal of the First Hawaii Case, 9th Circuit Docket Numbers 05-15223 and 0515347 on August 19, 2005, related to the appeal of the judgment in the First Hawaii Case.

9. Attached hereto as Exhibit "9" is a true and correct copy of the Memorandum Opinion Dated July 5, 2007, the Court of Appeals for the Ninth Circuit that also appears as *Berry v. Fleming Companies, Inc.*, 243 Fed. Appx. 260, 262, 2007 WL 1062946 (9th Cir. (Hawaii,2007).

10. Attached hereto as Exhibit "10" is a true and correct copy of the District Court's Order Denying Plaintiff's Motion for a Permanent Injunction in *Berry v. Hawaiian Express Service, Inc., et al.*, filed in the Instant Case on March 9, 2006.

11. The total amount of fees and costs awarded each party in these earlier cases, Mr. Berry's awards total \$ 284,692.72 and exceed all others by \$57,895.72. On Mr. Berry's behalf, I have sought to obtain debt verification pursuant to the Federal Fair Debt Collection Practices Act ("FDCPA") to establish the predicate that these creditors are the holder of the alleged rights to collect upon the purported judgment that would therefore be subject to offset if held by Fleming or the PCT, but they, in direct violation of the FDCPA these attorneys have refused to comply.

12. Attached hereto as Exhibit "11" is a true and correct copy of the Declaration of Lex Smith filed in in *In re Fleming Companies, Inc.*, Bk. No. 03-10945 (MFW) (Bankr. Del.).

13. Attached hereto as Exhibit "12" is a true and correct copy of the Declaration of Lyle Hosoda filed in in *In re Fleming Companies, Inc.*, Bk. No. 03-10945 (MFW) (Bankr. Del.).

14. Attached hereto as Exhibit "13" is a true and correct copy of an excerpt from the Transcript of Proceedings taken on August 28, 2006, before the Honorable Mary F. Walrath, United States Bankruptcy Judge, in *In re Fleming Companies, Inc.*, Bk. No. 03-10945 (MFW) (Bankr. Del.).

15. Attached hereto as Exhibit "14" is a true and correct copy of Order Denying Plaintiff's Motion to Recuse; Motion Granting Change in Venue filed in Wayne Berry v. Deutsche Bank et al, Civ. No. 07-172 SOM-LEK (D. Hawaii).

Executed at Honolulu, Hawaii, April 14, 2008.

/S/Timothy J. Hogan
TIMOTHY J. HOGAN